

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

CASE NO. 16-RC-266439

LAZARUS ENERGY HOLDINGS, LLC,

Employer,

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY,
ALLIED-INDUSTRY AND SERVICE WORKERS INTERNATIONAL UNION AFL-CIO

Petitioner.

**EMPLOYER'S MEMORANDUM IN SUPPORT OF MOTION TO REOPEN THE
RECORD, FOR RECONSIDERATION OF THE DECISION AND DIRECTION OF
ELECTION, AND MOTION TO DISMISS PETITION**

Prepared by:

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

Rodolfo R. Agraz*
Bindu R. Gross**

Counsel for Lazarus Energy Holdings, LLC

8117 Preston Road, Suite 500
Dallas, Texas 75225
(214) 414-0069
(214) 987-3927 (fax)
fito.agraz@ogletree.com
bindu.gross@ogletree.com

*Currently licensed in Georgia and North Carolina only; practice limited to federal law.

**Currently licensed in Pennsylvania and West Virginia only; practice limited exclusively to federal labor and workplace safety law.

DATED: NOVEMBER 3, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
I. PRELIMINARY STATEMENT	1
II. PROCEDURAL HISTORY.....	1
III. ARGUMENT	2
A. Legal Standard	2
B. Statement of Additional Evidence the Region Should Consider	3
C. The Board Should Consider Additional Information, Reconsider Its Finding That an Election is Proper, and Dismiss the Petition.	3
IV. CONCLUSION.....	6

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Cooper International</i> , 205 NLRB 1057 (1973)	4
<i>Davey McKee Corp</i> , 308 NLRB 839 (1992)	5
<i>Douglas Motors Corp.</i> , 128 NLRB 307 (1960)	5
<i>Fraser-Brace Engineering Co.</i> , 38 NLRB 1263 (1942)	5
<i>In re General Motors Corp.</i> , 88 NLRB 119 (1950)	5
<i>Hughes Aircraft Co.</i> , 308 NLRB 82 (1992)	4, 5
<i>Larson Plywood Co., Inc.</i> , 223 NLRB 1161 (1976)	4, 5
<i>M.B. Kahn Construction Co., Inc.</i> , 210 NLRB 1050 (1974)	5
<i>Martin Marietta Aluminum</i> , 214 NLRB 646 (1974)	4, 5
<i>MJM Studios</i> , 336 NLRB 1255 (2001)	4
Statutes	
29 U.S.C. § 159(c)(1)	4
National Labor Relations Act	4
Other Authorities	
29 C.F.R. § 102.65(e)(1)	2, 3

I. PRELIMINARY STATEMENT

COMES NOW counsel for Lazarus Energy Holdings, LLC (“LEH” or “Employer”), and, pursuant to Section 102.65(e) of the NLRB’s Rules and Regulations, files this Motion to Reopen the Record, and Motion to Dismiss the Petition.

LEH is the refinery operator of the facilities where the employees in the petitioned-for unit work. LEH seeks to introduce the additional evidence of a Declaration from Jonathan Carroll, LEH’s President. Carroll’s Declaration attests to the fact that the San Antonio Refinery (“TSAR”) has issued a notice providing that it has terminated the operations and maintenance contract (the “O&M Contract”) under which Employer had been hired by TSAR and Falls City Terminal, LP to operate facilities at (i) 7811 South Presa Street, San Antonio, Texas; (ii) 1 BDA Crossing, San Antonio, Texas; (iii) 20830 Lamm Road, Elmendorf, Texas; and (iv) 5999 County Road 211, Falls City, Texas (*i.e.*, each of the sites where the employees in the petitioned-for unit work) (the “Facilities”). This evidence was not introduced earlier because it was not public until October 29, 2020, 16 days after the October 13, 2020, pre-election Hearing.

This new evidence changes the analysis of the petitioned-for unit because a cessation of LEH’s operations at the Facilities is imminent. In light of this new evidence, the Region should apply controlling Board precedent and dismiss the Petition.

II. PROCEDURAL HISTORY

The Employer has previously summarized the factual and procedural background in this case. (*See, e.g.*, Employer’s Post-Hearing Brief and Emergency Motion and Request for Review, pp. 2-5.) For purposes of this Motion, a brief overview of relevant facts and recent developments follows below.

On September 22, 2020, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (the “Union”), filed

a representation petition (“Petition”) in Case No. 16-RC-266439 seeking certification as the exclusive bargaining representative of the following unit at LEH’s operations located in the San Antonio, Texas area:

Included: All full-time and regular part-time operators and maintenance employees, including terminal operators, lab techs, instrument techs, and electricians employed by the Employer at its facilities located at 7811 South Presa Street, San Antonio, Texas; 1 BDA Crossing, San Antonio, Texas; 20830 Lamm Road, Elmendorf, Texas; and, 5999 County Road 211, Falls City, Texas.

Decision.¹

The parties participated in hearing on October 13, 2020, (“Hearing”) where the sole issue discussed was the method of election. Tr. 9; Bd. Ex. 2. Following this Hearing, the Regional Director issued a Decision and Direction of Election (“DDE”) on October 23, 2020, and scheduled a mail-in ballot election for November 3, 2020.

III. ARGUMENT

A. Legal Standard

Section 102.65(e)(1) of the Board’s Rules and Regulations provides that “[a] party to a proceeding may, because of extraordinary circumstances, [...] move after the decision or report for reconsideration . . . or to reopen the record.” In addition:

A motion for rehearing or to reopen the record shall specify briefly the error alleged to require a rehearing or hearing de novo, the prejudice to the movant alleged to result from such error, the additional evidence sought to be adduced, why it was not presented previously, and what result it would require if adduced and credited. Only newly discovered evidence—evidence which has become available only since the close of the hearing—or evidence which the Regional Director or the Board believes should have been taken at the hearing will be taken at any further hearing.

¹ References to the hearing transcript will be referred to as “Tr.,” followed by the appropriate page number(s). References to exhibits introduced into evidence at the hearing are designated by the exhibit number, preceded by “Bd. Ex.” for the Board’s exhibits, and “E. Ex.” for Lazarus Energy’s exhibits.

29 C.F.R. § 102.65(e)(1).

B. Statement of Additional Evidence the Region Should Consider

The Region's October 23, 2020, Decision should consider the following additional evidence:

- Carroll's Declaration authenticating TSAR's October 28, 2020, communication to its vendors, announcing termination of its operations and management agreement with LEH, establishing that LEH's cessation of operations at the Facilities is imminent.

See Jonathan Carroll's Declaration. The Region should also consider TSAR's October 28, 2020, announcement:

The San Antonio Refinery LLC, ("TSAR"), which owns the refinery located at 7811 S Presa St, San Antonio, TX 78223 (the "**Refinery**"), announced today that it terminated its operations and maintenance contract (the "**O&M Agreement**") with Lazarus Energy Holdings, LLC ("**LEH**") on October 5, 2020.

Although the O&M Agreement was terminated, LEH will continue to operate the Refinery during the transition period under the terms of that agreement. The transition under the O&M Agreement (the "**Transition**") may extend through early February 2021.

Attachment to Declaration (collectively "Additional Evidence").

After considering this new evidence, the Regional Director should reconsider whether to direct an election in a unit which will cease to exist within three months of this filing.

C. The Board Should Consider Additional Information, Reconsider Its Finding That an Election is Proper, and Dismiss the Petition.

LEH seeks to introduce Additional Evidence to notify the Region that a material change to its operations where employees in the petitioned-for unit report. TSAR's notice establishes that a cessation of LEH's operations at the Facilities is imminent. This Additional Evidence necessitates reconsideration of the Region's October 23, 2020, DDE.

The National Labor Relations Act (“Act”) directs that the Board must investigate whether a question of representation exists for every representation petition filed. 29 U.S.C. § 159(c)(1). The Act further directs, “If the Board finds...that such a question of representation exists, the Board shall direct an election...and certify the results thereof.” *Id.* The Board, however, has recognized an imminent cessation of operations exception to the statutory mandate, which applies to circumstances in which it is reasonably certain that conducting an election will otherwise serve no purpose. *See, e.g., Hughes Aircraft Co.*, 308 NLRB 82, 83 (1992) (petition dismissed where unit would cease to exist two (2) months after the hearing). More specifically, the Board will dismiss an election petition when cessation of the employer’s operations is imminent, such as when:

1. An employer completely ceases to operate,
2. Sells its operations, or
3. Fundamentally changes the nature of its business.

See, e.g., MJM Studios, 336 NLRB 1255 (2001); *Hughes Aircraft Co.*, 308 NLRB 82; *Martin Marietta Aluminum*, 214 NLRB 646, 646-647 (1974); and *Cooper International*, 205 NLRB 1057, 1057 (1973).

The party asserting a cessation of operations bears the burden of proving that cessation of operations is both imminent and certain. *Hughes Aircraft Co.*, *supra* at 83; *Larson Plywood Co.*, *supra*; and *Martin Marietta Aluminum*, *supra* at 647. To meet this burden, the party is expected to present supporting evidence, including: announcements of business closure to the public and the employees; termination of employees, or other evidence that the Employer has definitively determined the sale, cessation, or fundamental change in the nature of its operations. *Hughes Aircraft Co.*, *supra* at 83; *Martin Marietta Aluminum*, *supra* at 646-647.

The Board further considers these factors:

1. The period of time between the representation hearing and the expected date of cessation,
2. Steps taken by the employer to effectuate the change, and
3. Whether the employees have been notified.

Hughes Aircraft, supra at 82-83; *Davey McKee Corp*, 308 NLRB 839, 840 (1992); *Larson Plywood Co.*, supra; *MJM Studios of New York, Inc.*, supra.

In such a case, the Board has made clear that it will dismiss a representation petition when cessation of the employer's operations is imminent. *Id.* See also *Larson Plywood Co., Inc.*, 223 NLRB 1161 (1976) (petition dismissed with three (3) months until liquidation); *Martin Marietta Aluminum, Inc.*, 214 NLRB 646 (1974) (petition dismissed where more than four (4) months of operations remained from date petition filed); *M.B. Kahn Construction Co., Inc.*, 210 NLRB 1050 (1974) (petition dismissed where project completion scheduled six (6) to seven (7) months from filing of petition); and *In re General Motors Corp.*, 88 NLRB 119 (1950) (petition dismissed where project scheduled for completion four (4) to six (6) months from the hearing); *Fraser-Brace Engineering Co.*, 38 NLRB 1263 (1942) (petition dismissed where all or most of the employees in the unit sought will be laid off within the next one (1) or two (2) months); *Douglas Motors Corp.*, 128 NLRB 307 (1960) (evidence showed that the employer intended to subcontract all of its operations within six months).

Here, LEH has met its burden to establish that cessation of its operations at the Facilities is imminent:

1. The Additional Evidence explains that TSAR issued a notice to its vendors that it had terminated the O&M Contract with LEH.
2. LEH has shared this notice to the employees in the petitioned-for unit.

3. This announcement was communicated to employees on October 30, 2020 – 17 days after the Hearing in this case.

See Additional Evidence. These changed circumstances are irrefutable – cessation of LEH's operations at the Facilities is imminent. When presented with similar facts, the Board has consistently applied to controlling precedent and has dismissed similar petitions. The same outcome should follow here: the Region should consider the Additional Evidence, reconsider its Decision and Direction for Election, and dismiss the Petition.

IV. CONCLUSION

For the foregoing reasons, LEH respectfully requests that the Board direct the Region to consider the Additional Evidence, reconsider its DDE, and dismiss this case.

Dated this the 3rd day of November 2020.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By: /s/ Bindu R. Gross

Rodolfo R. Agraz*

Bindu Gross**

Attorneys for Lazarus Energy Holdings, LLC

* Currently licensed in Pennsylvania and West Virginia only; practice limited exclusively to federal labor and workplace safety law.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

LAZARUS ENERGY HOLDINGS, LLC)
)
Employer,)
)
and)
)
UNITED STEEL, PAPER AND)
FORESTRY, RUBBER,)
MANUFACTURING, ENERGY,)
ALLIED-INDUSTRY AND SERVICE)
WORKERS INTERNATIONAL UNION)
AFL-CIO)
)
Petitioner.)
_____)

Case No. 16-RC-266439

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum in support of Motion to Reopen the Record, For Reconsideration of the Decision and Direction of Election, and Motion to Dismiss Petition has been served on the following on the date below by counsel for Lazarus Energy Holdings, LLC:

Timothy L. Watson, Regional Director
Zachary Long, Field Examiner
National Labor Relations Board - Region 16
zachary.long@nlrb.gov
By Electronic Filing and Email

Brad Manzolillo
Dionisio Gonzalez
bmanzolillo@usw.org
dgonzalez@usw.org
By Email

Dated this the 3rd day of November 2020.

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By: /s/ Bindu R. Gross
Bindu R. Gross*
Attorney for Lazarus Energy Holdings, LLC

* Currently licensed in Pennsylvania and West Virginia only; practice limited exclusively to federal labor and workplace safety law.